No. 06-735

IN THE

Supreme Court of the United States

JANE DOE,

Petitioner,

v.

OBERWEIS DAIRY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does a Title VII plaintiff who seeks compensatory damages for emotional distress, and who proposes to testify that she experienced symptoms of emotional distress and that she sought treatment for those symptoms, thereby place her emotional condition at issue such that she waives the psychotherapist-patient privilege as to records relating to her emotional condition?

PARTIES TO THE PROCEEDINGS

Respondent is Oberweis Dairy, Inc. Petitioner is Jane Doe, who was permitted to proceed under a pseudonym. In addition, Jane Roe and Jane Roe 2 (also pseudonyms) were permitted to appear below as proposed intervenor-appellants. The United States Equal Employment Opportunity Commission, the National Employment Lawyers Association, Women Employed, and the Illinois Coalition against Sexual Assault appeared as *amicus curia* in support of the Petitioner, Jane Doe.

RULE 29.6 STATEMENT

Respondent Oberweis Dairy, Inc. is a non-governmental corporation. Respondent is a wholly owned subsidiary of The Oberweis Group, Inc. No publicly held company has any ownership interest in Respondent or its parent corporation.

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SUMMARY OF REASONS TO DENY THE PETITION

Contrary to Doe's assertions, there exists no split of authority among the federal circuits on the issue of psychotherapist-patient privilege presented in Doe's petition. To create the appearance of a circuit-split, Doe misleadingly relies upon an Eighth Circuit decision that is fully in accord with the decision below, and upon two Fifth Circuit decisions that do not mention the psychotherapist-patient privilege, let alone adopt a rule contrary to the Seventh Circuit's decision.

Further, the Seventh Circuit correctly ordered Doe to produce her records. Doe seeks damages for emotional distress, which she seeks to prove through testimony that she sought therapy, and of specific symptoms of emotional distress. In so doing, she has placed her emotional condition at issue.

Doe argues that she should be permitted to do so without disclosing her therapy records, because she does not intend to actually call her therapist as a witness or introduce specific communications with her therapist. If adopted, such a standard would allow Doe to employ the psychotherapist-patient privilege as both sword and shield, letting her introduce the fact that she sought treatment for emotional distress and specific symptoms of her alleged distress, while preventing meaningful discovery as to her emotional condition and the causes of any distress she may have experienced.

Accordingly, the Seventh Circuit correctly held that Doe has waived the psychotherapist-patient privilege as to her therapy records. In so doing, the court did not undermine the

policy behind the privilege recognized in *Jaffee*: the psychotherapist-patient privilege remains absolute, subject to waiver by the patient. Doe has waived the privilege by her own pleading, and remains free to limit her claim for compensatory damages in a manner that would remove her emotional condition from dispute.

STATEMENT OF THE CASE

Jane Doe sued Oberweis, her former employer, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Doe claims that she was sexually harassed by another former Oberweis employee, Matthew Nayman. It is uncontested that Doe and Nayman had sex at Nayman's apartment, that Doe was just under seventeen years old at the time, and that Nayman was 25. It is also uncontested that Nayman did not forcibly rape Doe: disobeying her mother's instruction not to socialize with Nayman, Doe voluntarily went alone to Nayman's apartment, where she and Nayman had sex. Because Illinois law sets 17 as the age of consent, Nayman was convicted of aggravated criminal sexual abuse of a minor under 720 ILCS 5/12-16(d).

Doe subsequently filed a charge of discrimination with the EEOC, which the agency dismissed after Doe refused to submit to an interview. Doe then filed this lawsuit. In addition to her Title VII claim, Doe asserted claims of negligence, assault and battery, "willful and wanton misconduct," negligent infliction of emotional distress, and intentional infliction of emotional distress. In her prayer for relief, Doe expressly seeks compensatory damages for "emotional pain," "suffering," and "mental anguish."

Because Doe sought damages based upon alleged emotional injuries, Oberweis served interrogatories and requests for production seeking information and documents relating to her emotional state, including records of any treatment she received for her alleged injuries. In the course of discovery, Doe disclosed that she attended therapy for her alleged emotional injuries, but refused to produce records relating to her therapy sessions, asserting (among other things) that they are subject to the psychotherapist-patient privilege. Oberweis then filed a motion to compel production of the records. In response to that motion, Doe voluntarily dismissed her intentional and negligent infliction of emotional distress claims, and argued that her remaining claims for emotional distress damages did not waive the privilege because she did not intend to call her therapist as a witness or testify as to the substance of her communications with the therapist.

The district court granted Oberweis's motion to compel, holding that Doe waived the psychotherapist-patient privilege by placing her emotional condition at issue in the case through her claim for emotional distress damages, notwithstanding the dismissal of her state law claims for intentional and negligent infliction of emotional distress. Doe moved for reconsideration of this order. She again argued that she had not waived the psychotherapist-patient privilege, because she sought damages only for "garden variety" emotional distress. Doe also asserted for the first time that she received counseling not only for the emotional distress she allegedly experienced as a result of her encounter with Nayman, but also prior to that incident, in connection with her parents' divorce. Doe disclosed that her mother and sister participated in the therapy sessions, and argued that the therapy notes should be privileged from disclosure in order

to protect their privacy. The district court denied the motion for reconsideration, but ordered Doe to file a statement of her proposed testimony on the issue of emotional damages.

In her statement, Doe proposed to testify that that "she cried, felt taken advantage of and experienced a loss of self respect;" that she "had a difficult time concentrating on her school work," "felt ostracized from her schoolmates and friends," "nervous about entering into dating relationships," and "hesitant about obtaining another job working with strangers." She further proposed to testify about continuing emotional distress. Shortly thereafter, the district court entered an order providing that Doe was not required to produce her therapy records, but that her therapist would be precluded from testifying, and that Doe's testimony as to emotional damages would be limited to "garden variety emotional distress." To meet this standard, the district court held that Doe's testimony must be "limited to the negative emotions that she experienced as the intrinsic results of defendant's alleged conduct, [and] she has been barred from introducing evidence of any resulting symptoms or conditions that she might have suffered." (Appendix to Petition for Writ of Certiorari ("Pet. App."), 29a.)[1]

Subsequently, the district court granted Oberweis's motion for summary judgment as to Doe's Title VII claims, and dismissed her remaining state law claims for lack of jurisdiction. Doe appealed, and the Seventh Circuit reversed the district court's entry of summary judgment. However, it held that Doe waived the psychotherapist-patient privilege as to records relating to her emotional condition by placing

1. It is unclear from the district court's order whether the it found that Doe's statement of proposed testimony fell within these limitations.

that condition at issue through her claim for emotional distress damages. (Pet. App., 24a-25a.) Consequently, the court found that Doe is required to produce her therapy records, but that records relating exclusively to Doe's mother and sister need not be produced. (*Id.*) Doe and Oberweis both filed timely petitions for rehearing *en banc*. The Seventh Circuit denied both petitions by order dated August 31, 2006. (Pet. App., 1a.)

REASONS FOR DENYING THE PETITION

I. There is no split of authority between the circuits on the question presented.

Contrary to Doe's assertion that "[t]hree circuits have had the opportunity to review the waiver of the psychotherapist-patient privilege in Title VII cases, and each one has set a different standard," (Petition for Writ of Certiorari ("Pet."), 5) the circuit court case law cited in Doe's petition does not evidence any split in authority. According to Doe, the supposed three-way split arises from the decision of the Seventh Circuit below; the Eighth Circuit's ruling in *Schoffstall v. Henderson*, 223 F.3d 818 (8th Cir. 2000), and two Fifth Circuit decisions, *Patterson v. PHP Healthcare*, 90 F.3d 927 (5th Cir. 1996), and *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996).

Far from disagreeing with *Schoffstall*, the decision below cites that case in support of its ruling that Doe must produce her psychological counseling records. (Pet. App., 24a.) As for the Fifth Circuit decisions, neither *Patterson* nor *Farpella-Crosby* even mentions the word "privilege." Neither case addresses the discoverability of psychological records generally, let alone the specific circumstances under which a plaintiff's attempt to recover emotional distress damages results in a waiver of the psychotherapist-patient privilege.

In *Patterson*, the Fifth Circuit reversed an award of emotional distress damages to two plaintiffs, finding that the plaintiffs failed to present competent evidence of emotional injuries. *Patterson*, 90 F.3d at 941. In *Farpella-Crosby*, the plaintiff testified that she felt embarrassed, belittled, disgusted, hopeless, and stupid as a result of harassment by the director of the facility where plaintiff worked, and that her work environment was "very stressful" as a result. Her testimony was corroborated by a co-worker. The Fifth Circuit concluded that the plaintiff's testimony, combined with that of her co-worker, was sufficient to support an award of mental anguish damages. It did not hold that the plaintiff's testimony did not put her mental condition "in controversy" – only that the testimony presented was sufficient to support an award of damages. *Farpella-Crosby*, 97 F.3d at 809.

Here, unlike in *Patterson* and *Farpella-Crosby*, the Seventh Circuit did not discuss what evidence Doe would need to prove emotional distress damages without presenting her therapist's testimony. Rather, it simply held that, in light of her proposed testimony regarding her alleged symptoms and the fact that she received therapy for those symptoms, Doe placed her emotional condition at issue, and that Oberweis is entitled to discovery of records relating to that condition. Nothing in the Fifth Circuit's rulings is contrary to this holding.

II. The Seventh Circuit correctly held that Doe must produce her counseling records.

In Doe's own words, she seeks to "place before the jury her claims of emotional distress and treatment." (Pet., 12.) Doe wishes to testify about the alleged "long lasting effects" of her "traumatic" sexual encounter with Nayman, the

symptoms treated by her psychotherapist, and the fact that she obtained treatment. (Pet., 13-14.) However, because she does not intend to call her therapist as a witness or rely upon any specific communications with her therapist, Doe contends that she should not be required to produce any records of her therapy. In so doing, Doe attempts to use the psychotherapist-patient privilege as both a sword and a shield, allowing her to place her emotional condition and psychological treatment at issue, while preventing Oberweis from testing the truth of her claims.

Contrary to Doe's assertions, the extremely narrow waiver rule she advocates is not necessary to make the psychotherapist-patient privilege meaningful. Conversely, the ruling of the Seventh Circuit will not undermine the essential purpose of that privilege. As this Court explained in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the purpose of the psychotherapist-patient privilege is to foster an atmosphere of trust and full disclosure between patient and therapist necessary for effective therapy. *Id.* at 10. According to *Jaffee*, this goal can be achieved only if patients know with a reasonable degree of certainty whether a given communication will be privileged from disclosure. For that reason, the Court rejected a rule in which application of the privilege would be subject to "a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure. . . ." *Id.* at 18.

While *Jaffee* stressed the need for predictability, it also acknowledged that the psychotherapist-patient privilege cannot be used as both sword and shield. Rather, like other testimonial privileges, it is subject to waiver by the patient. *Id.* at 15, n14. In a case involving waiver, the concerns raised by the *Jaffee* Court do not arise, because the patient controls

the circumstances under which a privileged communication must be produced. This was not the case in *Jaffee*, where the plaintiff sought the defendant's therapy notes to prove her own claims, not to test any counterclaim or defense raised by the defendant. Doe, unlike the defendant in *Jaffee*, is the master of her own case: it is she who elected to seek damages for emotional distress, and therefore she who ultimately controls the production of her therapy records. The ruling below does not change this – rather, it merely makes Doe's choice clear.

III. If the Court grants Doe's Petition, it should also grant Oberweis's Petition.

While the question presented by Doe's Petition does not warrant review by this Court, Oberweis has filed a separate petition for writ of *certiorari*, No. 06-767, raising three questions which, Oberweis submits, do merit this Court's attention. Specifically, these include:

> 1. Does a person claiming to be aggrieved by a violation of Title VII have a duty to cooperate with the Equal Employment Opportunity Commission's efforts to investigate the person's charge of discrimination, such that failure to cooperate may bar the person from maintaining a private action under Title VII?
>
> 2. Must a plaintiff who voluntarily engaged in sexual intercourse with a co-worker prove that the encounter was unwelcome and that she subjectively perceived the co-worker's conduct to be hostile or abusive in order to establish a claim of sexual harassment under Title VII, notwithstanding the fact that the plaintiff was below the age of consent established by state law?

> 3. If the second question is answered in the affirmative, did the district court correctly conclude that Doe failed to present evidence establishing a disputed issue of material fact for trial as to whether her sexual encounter with Nayman was unwelcome, and whether she subjectively viewed her work environment as hostile or abusive as a result of the encounter?

While the issue presented by Doe's petition addresses an issue of discovery and one aspect of her claim for damages, these questions go to the heart of Doe's Title VII claim. To consider the narrow issue defined by Doe without considering the underlying question of whether she has a valid Title VII claim at all would be contrary to the interests of justice. Accordingly, should the Court decide to consider the question presented by Doe, Oberweis submits that it should also grant review as to the questions presented in Oberweis's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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